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In The

Supreme Court of the United States

October Term, 1993

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether a congressional race-based set aside program for awarding highway construction contracts survives an as applied constitutional challenge when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by the governmental entity seeking to remedy the discrimination?

2. Whether "strict scrutiny," as opposed to "a lenient standard, resembling intermediate scrutiny," is the proper standard of review for determining the constitutionality of a race-based, program adopted by Congress?

3. Whether the Fifth Amendment requires a federal agency, in implementing a federal race-based, set aside program and when exceeding the goals adopted by Congress, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)?

LIST OF PARTIES

Adarand Constructors, Inc. ("Adarand") was Plaintiff in the United States District Court for the District of Colorado and Appellant before the United States Court of Appeals for the Tenth Circuit. Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of Colorado and Appellees before the United States Court of Appeals for the Tenth Circuit: Samuel K. Skinner, in his official capacity as Secretary of the Department of Transportation (Mr. Skinner has since been replaced in his official capacity by Federico Pena); Robert E. Farris, in his official capacity as Administrator of the Federal Highway Administration (Mr. Farris has since been replaced in his official capacity by Thomas D. Larsen); Louis N. MacDonald, in his official capacity as Administrator of Region VIII of the Federal Highway Administration; and Jerry Budwig, in his official capacity as Division Engineer of the Central Federal Lands Highway Division.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the, as yet unpublished, opinion of the Tenth Circuit Court of Appeals, dated February 16, 1994, appearing at pages App. 1 to App. 26 of the Appendix. The opinion and order of the District Court, dated April 21, 1992, *Adarand Constructors, Inc. v. Skinner*, 790 F.

Supp. 240 (D.Colo. 1992), appear at pages App. 26 to App. 38 of the Appendix.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the Tenth Circuit Court of Appeals on February 16, 1994. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the U.S. Constitution are at issue in this Petition for *Writ of Certiorari*.

STATUTE INVOLVED

The statute involved in this appeal is §502 of the Small Business Act, 15 U.S.C. §644(g). App. 39 to 40.

STATEMENT OF THE CASE

On August 10, 1990, Adarand Constructors, Inc. filed an action in the United States District Court for the District of Colorado challenging the use, by the Central Federal Lands Highway Division (CFLHD), of a contract provision referred to as the "Subcontracting Compensation Clause" (SCC). The express purpose of the SCC is to

induce prime contractors on federal highway projects to hire subcontractors based upon the race or gender of the owners rather than the amount of the bids of those subcontractors. The SCC authorizes bonus payments to the prime contractors as the mechanism to induce the award of subcontracts to minorities and women.[1]

This case presents a challenge to the Small Business Act of 1953, as amended (SBA), 15 U.S.C. §631 *et seq.*, which provides the sole source of statutory authority for the SCC program.[2] Adarand asserts that the SCC program adopted in accordance with the SBA, violates the right of equal protection guaranteed by the Fourteenth Amendment, as incorporated by the Fifth Amendment. Adarand further asserts that the SCC program violates the privileges and immunities secured by 42 U.S.C. §1983 and 42 U.S.C. §2000(d).[3]

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[1] The size of the bonus offered under the SCC program equals 10% of the final amount of the Disadvantaged Business Enterprise ("DBE") subcontracts, not to exceed 2% of the final prime contract amount (1.5% if the prime contractor only contracts with one DBE subcontractor). Moreover, the CFLHD requires prospective prime contractors to include a bid item amount to be awarded to the prime contractor under the SCC program regardless of whether the prime contractors intend to collect that money. Thus, a prime contractor cannot gain an advantage over other prime contractors by agreeing to forego the benefits available under the SCC.

[2] A second statute, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987), is implicated only in that it provided the funding for the construction project at issue in this case, the West Dolores Project. Adarand does not challenge the constitutionality of STURAA in this case.

[3] Different from other cases recently presented to this Court to resolve these and other concerns regarding the issue of

Cross Motions For Summary Judgment were filed on April 24, 1991. On April 21, 1992, the District Court issued an opinion and order denying Adarand's Motion For Summary Judgment and granting the United States' Motion For Summary Judgment.

On August 5, 1992, after obtaining a timely Motion For Extension Of Time To File Appeal, Adarand filed a Notice Of Appeal with the Tenth Circuit Court of Appeals. The matter was decided in an opinion dated February 16, 1994. This Petition for *Writ of Certiorari* follows.

STATEMENT OF FACTS

Adarand is a highway construction company. Randy Pech, who is a white male, is part owner and serves as general manager of Adarand. In this capacity, he is responsible for the company's day-to-day operations.

The CFLHD is an agency within the United States Department of Transportation (DOT). Its function is to supervise the construction and maintenance of highways on federally-owned lands within its geographic region.[4]

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the use of race in federal decision making, Adarand has not stipulated that the underlying statute is constitutional. Adarand has challenged the statute and the SCC program upon which it is based both facially and as applied.

[4] The geographic region of the CFLHD includes all or part of the following states: Colorado, Nebraska, North Dakota, California, Wyoming, Utah, Arizona, New Mexico, Texas, South Dakota, Nevada, Kansas, and Hawaii.

On August 10, 1989, the CFLHD issued a solicitation for bids for the construction of a 4.7 mile section of highway to be located in the San Juan National Forest (the West Dolores Project) in southern Colorado. Section 108 of the contract for the West Dolores Project is the "Subcontracting Compensation Clause." The SCC pays a monetary bonus to all prime contractors who hire "disadvantaged" subcontractors to perform work constituting more than 10% of the overall contract amount.

On September 15, 1989, the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel). Shortly thereafter, Adarand submitted the lowest bid for the guardrail portion of the project to Mountain Gravel. However, Mountain Gravel awarded the subcontract to a certified DBE, the Gonzales Construction Company. The sole reason for the decision of Mountain Gravel to award the subcontract to the Gonzales Construction Company, rather than to Adarand, was to obtain the $30,000.00 bonus payment from the CFLHD.

The CFLHD highway contracting program has, as its statutory basis, the SBA, which applies to all federal procurement activities and requires the President to set an annual "goal" of awarding not less than 5% of all contracts to small businesses owned and controlled by "socially and economically disadvantaged individuals." 15 U.S.C. §644(g)(1). However, the SBA also provides:

> Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns

> owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

Id. The term "socially and economically disadvantaged individuals" is also defined by the statute.[5]

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[5] As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern –

> (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
> (ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. §637(d)(3)(C). Businesses owned or operated by white males are not presumed to be "disadvantaged."

REASONS FOR GRANTING THE WRIT

I. A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION BELOW AND DECISIONS RENDERED BY THIS HONORABLE COURT.

A. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS, THAT THE PROPER STANDARD OF REVIEW OF A RACE-BASED CONGRESSIONALLY-MANDATED PROGRAM IS "INTERMEDIATE SCRUTINY," IS IN DIRECT CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

The Tenth Circuit Court of Appeals applied an improper standard of review to the race-based program challenged herein:

> [I]f Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality.

App. 15. The Court reached its conclusion by combining the opinion authored by Chief Justice Burger with the concurring opinion authored by Justice Marshall.[6] This holding of the Tenth Circuit is in conflict with the decisions of this Honorable Court. A "lenient standard, resembling intermediate scrutiny" is not the standard set forth by a majority of the Justices in the *Fullilove* decision,

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[6] "A majority of the [*Fullilove v. Klutznick*, 448 U.S. 448 (1980)] Court agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress." App. 15, fn. 10.

nor is it the standard set forth in previous or later decisions of this Court.[7]

Although there is some question regarding whether Chief Justice Burger's opinion was based upon a "strict scrutiny" standard,[8] he clearly required use of a standard higher than intermediate scrutiny:

> We recognize the need for *careful judicial evaluation* to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is *narrowly tailored* to the achievement of that goal.

Fullilove, 448 U.S. at 480. (Emphasis added.) Furthermore Chief Justice Burger wrote:

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[7] The concurring opinion authored by Justice Marshall supports an "intermediate scrutiny" standard for the *Fullilove* factual situation because Justice Marshall rejected both "strict scrutiny" and "the minimally rigorous rational-basis standard of review." *Fullilove*, 448 U.S. at 519. The constitutional test is met, wrote Justice Marshall, when the program is "designed to further remedial purposes [which] serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519. But Justice Marshall was joined by only two other Justices, *i.e.* Justice Brennan and Justice Blackmun.

[8] "The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny'. . . . " *Croson*, 488 U.S. at 487. Although this part of the decision was authored by Justice O'Connor, it should be noted that the language from this portion of the *Croson* decision did not draw support from a majority of the Court.

> *Any preference* based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees.

Fullilove, 448 U.S. at 491. (Emphasis added.) "Careful judicial evaluation," "narrow tailor[ing]" and "most searching examination" indicate a level of scrutiny much closer to "strict scrutiny" than to "intermediate scrutiny."

Chief Justice Burger set forth a two step analysis for reviewing the Public Works Employment Act (PWEA) program reviewed in *Fullilove*. However, there is nothing in that analysis from which to infer that he intended any standard other than strict scrutiny. In fact, just the opposite is true as shown by the language quoted above and by the second step of Chief Justice Burger's analysis:

> the limited use of racial and ethnic criteria in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

Fullilove, 448 U.S. at 473. (Emphasis in original.)

This Honorable Court has always used "the most rigid scrutiny" in considering "violation[s] [of] the equal protection component of the Due Process Clause of the Fifth Amendment." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).[9] "Most rigid scrutiny" is "strict scrutiny."

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[9] "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. It is not to say that all such restrictions are unconstitutional. It is to say that *courts*

Even Justice Marshall, in his concurring opinion in *Fullilove*, recognized that the "conventional" test is "strict scrutiny." *Fullilove*, 448 U.S. at 519.

The standard of review articulated by Chief Justice Burger was not, contrary to the holding of the Tenth Circuit, "a lenient standard, resembling intermediate scrutiny," but rather the "conventional" "strict scrutiny" standard.[10] Therefore, the Tenth Circuit's opinion is in

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must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. at 216. (Emphasis added.) *See also University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (when decision making touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear because of his race or ethnic background is precisely tailored to serve a compelling governmental interest); *Virginia v. Loving*, 388 U.S. 1, 11 (1967) (the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny"); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("[c]lassifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect").

[10] The conclusion that Chief Justice Burger's standard of review is the conventional standard or strict scrutiny is bolstered by the concurring opinion of Justice Powell.

> Although I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
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> * * *
>
> [The PWEA] employs a racial classification that is constitutionally prohibited unless it is a necessary

conflict with the decisions of this Honorable Court when the Tenth Circuit holds that "[a] majority of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster." App. 16, (continuation of fn. 10).

The Tenth Circuit held that *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990):

> put to rest any lingering doubts about the continuing vitality of *Fullilove*: . . . "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

App. 19. The Tenth Circuit then concluded:

> the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.

App. 19. Again the holding of the Tenth Circuit is in conflict with the decisions of this Honorable Court.

> means of advancing a *compelling governmental interest*. (Citing *Bakke*) For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.
>
> * * *
>
> Racial classifications must be assessed under *the most stringent level of review*. . . .

Fullilove, 448 U.S. at 496. (J. Powell, concurring.) (Emphasis added.) Compelling governmental interest and the most stringent level of review are "strict scrutiny."

Only four Justices in *Metro Broadcasting* agreed "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments" and that "intermediate scrutiny" is the proper standard of review. Four Justices do not constitute a majority holding.[11]

Justice Stevens' concurring opinion can not be cited as a basis for weakened scrutiny since he demands that the reasons for racial classifications be "clearly identified and unquestionably legitimate." *Metro Broadcasting v. FCC*, 497 U.S. at 601, citing his dissenting opinion in *Fullilove*. In his dissenting opinion in *Fullilove*, Justice Stevens wrote "[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).[12] Since Justice Stevens dissented in *Fullilove* and Justice Marshall concurred, it cannot be argued that Justice Stevens' view of the proper

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[11] Those four justices were Brennan, White, Marshall and Blackmun. Justice Stevens wrote a concurring opinion by which he joined in the decision, but through which he set forth a different standard of review from the standard set forth by Justice Brennan. Justice Stevens' standard of review is much closer to "strict scrutiny" than to "intermediate scrutiny." *Metro Broadcasting v. FCC*, 497 U.S. at 601-602 (concurring opinion of Justice Stevens).

[12] Congress has done neither. It has not "clearly articulate[d] the need and basis for [the] racial classification" and has not "tailor[ed] the classification to its justification." "The Court should not uphold this . . . statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).

standard of review is the same as that set forth by Justice Marshall in *Fullilove*.

While Justice Stevens listed several situations where race-based measures are "unquestionably legitimate," the list does not include highway construction or government contracts. *Metro Broadcasting*, 497 U.S. at 601-602.[13] Justice Stevens' failure to include contracting as an "unquestionably legitimate" race-based measure and his dissent in *Fullilove* appear to manifest his view that contracting requires a different level of scrutiny than, for example, public broadcasting, and that congressionally-mandated public works laws are subject to a more rigorous standard of review, *i.e.* strict scrutiny.

As this Court has held on numerous occasions, strict scrutiny is the only standard of review to be applied to race-based programs like the one at issue in this case, even if the program is mandated by Congress. Since the decision of the Tenth Circuit is in direct, intolerable and irreconcilable conflict with the decisions of this Honorable Court regarding the proper standard of review for race-based programs, it is imperative that this Honorable Court grant this *Writ of Certiorari* to resolve the conflict.

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[13] That list is "extremely narrow" and includes "broadcast diversity"; "an integrated police force"; "a public school faculty"; and "the student body of a professional school." *Metro Broadcasting*, 497 U.S. at 601-602.

B. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS, REGARDING THE "PRINCIPAL LESSON OF *FULLILOVE*," IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *FULLILOVE*.

The Tenth Circuit held:

> The splintered *Fullilove* Court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and ethnic preference, satisfied equal protection requirements. 448 U.S. at 480 (Opinion of Burger, C.J.) In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the "'great weight'" given to the decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted).

App. 21-22. (Emphasis in original.) The Tenth Circuit opinion is in error and is in direct conflict with decisions of this Honorable Court.

1. THE STATUTE IN QUESTION CONTAINS NO WAIVER PROVISION AS REQUIRED BY THE DECISIONS OF THIS COURT.

In *Fullilove*, in response to a facial challenge of a race-based, set-aside program, this Court upheld the constitutionality of that federal program. However, the federal program was upheld, in large part, because of the flexible nature of the program, specifically a "waiver" provision

allowing states to opt out of the race-based, set-aside federal program "where application of the program is not feasible." *Fullilove*, 448 U.S. at 468; *see Croson*, 488 U.S. at 488-489.[14]

This Court has established the need for a waiver provision if a race-based program is to withstand constitutional scrutiny. As noted in *Croson*, it was the presence of the waiver provision which ensured the constitutionality of the PWEA when challenged, facially, in *Fullilove*.[15] Thus, the waiver provision does not exist for administrative tidiness and nicety, but to ensure that the only basis that permits resort to a race-based standard – that is, to remedy prior state-sponsored discrimination – is not circumvented. This Court held that the waiver provision was to be used to prevent the unconstitutional application of the race-based remedy set forth in the PWEA.[16]

There is no waiver or similar provision in the Small Business Act (15 U.S.C. §644(g)) or the SCC. As noted by the Tenth Circuit:

> The Small Business Act provides the statutory authority for agencies to establish specific utilization goals for disadvantaged small businesses. 15 U.S.C. §644(g). In compliance with section 502 of the Small Business Act, the heads of the various federal agencies, including the DOT,

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[14] "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Croson*, 488 U.S. at 499.

[15] *Croson*, 488 U.S. at 489.

[16] *Fullilove*, 448 U.S. at 481-482.

> *must* establish annual goals for small business participation in federal procurement contracts. *Id.* §644(g)(2). These goals *must* present the "maximum practicable opportunity" for small business concerns, including those "owned and controlled by socially and economically disadvantaged individuals." *Id.* §644(g)(1).

App. 5-6. (Emphasis added.) The continued use of the word "shall" throughout the statute and the Tenth Circuit's use of the word "must" underscores the inflexibility of this race-based program. There is no language in the SBA or the SCC which can be construed as a waiver provision, let alone specific language which meets the standard required by *Fullilove*.[17]

Since the statute in question contains no "waiver" provision, the decision of the Tenth Circuit that this program passes constitutional muster is in direct conflict with the decisions of this Honorable Court. Therefore, this Petition should be granted to remedy the conflict.

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[17] The Tenth Circuit states: "Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program implemented by the CLFHD is narrowly tailored to achieve the remedial purpose of section 502." App. 22. This is a mischaracterization of Adarand's Reply Brief. The Brief states: "Adarand concedes, *for the sake of discussion*, that the evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*. However this concession is not enough to save the Federal Defendants' argument." App. 43. (Emphasis added.) By adding the language "for the sake of discussion," Adarand was stating that for purposes of the discussion it could be assumed that the evidence met the requirements of *Fullilove*. This is much different from a stipulation. Adarand simply did not stipulate as indicated by the opinion of the Tenth Circuit.

2. THE STATUTE IN QUESTION IS NOT "NARROWLY TAILORED" AS REQUIRED BY DECISIONS OF THIS COURT.

To pass constitutional scrutiny, the governmental body using the race-based remedy must show a "compelling governmental interest." In addition, the use of the limited race-based program must be "narrowly tailored" to meet the "compelling governmental interest" thus identified. In spite of the decisions of this Court, the Tenth Circuit held that the "*significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises" meets the test. App. 23. (Emphasis added.) There are several problems with this holding. First, "significant governmental purpose" is not what the government must show. The proper standard to be met, according to the decisions of this Court is a "compelling governmental interest." There is no "compelling governmental interest" identified for the use of a race-based program in the SBA.[18]

Furthermore, the statute in question is not narrowly tailored. Narrow tailoring requires that the race-based remedy "will not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 523 (Powell, concurring). In other words, the CFLHD must, as a result of the Fifth and Fourteenth Amendments, determine whether the means chosen to effectuate a clearly identified

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[18] "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' " *Croson*, 488 U.S. at 498.

compelling governmental interest are "narrowly tailored to the achievement of that goal," that is, "limited in scope and duration." *Wygant v. Jackson Board of Education, et al.*, 476 U.S. 267, 285 (1986).

In finding the PWEA program challenged in *Fullilove* constitutional, Chief Justice Burger focused on the fact that the program under review was "a short-term measure to alleviate the problem of national unemployment." *Fullilove*, 448 U.S. at 457.[19] Without a statutory provision establishing a limited time period for the use of the race-based remedy, the program cannot be said to be narrowly tailored.

The statute challenged in this Petition has been in place since 1968 and shows signs of lasting forever.[20] The

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[19] "The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration. . . . " *Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.) "The . . . set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer that the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 513 (Concurring opinion of Powell, J).

[20] Not only does that program appear to be here to stay, it is also a "monster" program. The statute requires a minimum of 5% for minority participation in all of the federal government's procurement activities and demands that the level of participation be established at "the maximum practicable opportunity" for DBEs, which could represent up to 100% of the total federal government procurement contracts. Even 5% has to represent billions of dollars which are awarded based on race. Obviously, this program is in conflict with this Court's opposition to race-based programs which are "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476

law contains no automatic sunset provision and there is no reason to believe that the matter will be revisited by Congress in the near future, as indicated by the Tenth Circuit:

> [T]he SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "reassessment and reevaluation by Congress."

App. 23. If this statement is true then every action of Congress is "appropriately limited in extent and duration." This does not provide the protection this Court has held that the Constitution requires.

A second aspect of narrow tailoring is that the program must be designed to remedy clearly identifiable discrimination.[21] Yet, since there are no findings that identify the discrimination this program seeks to remedy,[22] it suffers from the same problem Justice O'Connor identified in *Croson*:

U.S. at 276. Mr. Budwig: "I'm not aware that [the Government's DBE program's] end is in sight." App. 46-47.

[21] "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to *remedy* such discrimination." *Wygant*, 476 U.S. at 274. (Emphasis added.)

[22] This is the a problem recognized by Justice Powell in his concurring opinion in *Fullilove*:

> Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly

> [I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.

Croson, 488 U.S. at 498.

Failure of this race-based program to provide the necessary flexibility, *i.e.* waiver, and a time limit for its use, proves that the program at issue is not narrowly tailored.

If the program is not narrowly tailored it is unconstitutional under the strict scrutiny standard required by the decisions of this Honorable Court. For these reasons this Petition must be granted.

C. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT CONGRESS "CAN ENGAGE MORE FREELY IN AFFIRMATIVE ACTION THAN STATES AND LOCALITIES" IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Tenth Circuit held:

> The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting

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in areas of the country where minority group members constitute a small percentage of the population. *Fullilove*, 448 U.S. 514 (Justice Powell, concurring opinion). Colorado, the location of the contract at issue in this case fits within the areas of the country described by Justice Powell. Defendant Budwig testified he didn't believe there had ever been any discrimination in the highway construction industry in Colorado. App. 45-46.

> under congressional authority, can engage more freely in affirmative action than states and localities.

App. 18. This statement is in direct, true and irreconcilable conflict with the holdings of this Court:

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Bolling v. Sharpe, 347 U.S. at 500. The holding of the Tenth Circuit with regard to the relationship of *Fullilove*, *Croson*, and *Metro Broadcasting* is in error. Since none of the opinions written in *Fullilove* was a plurality, let alone a majority opinion, *Fullilove* cannot be read to overrule previous Supreme Court precedence.

Although *Metro Broadcasting* had a plurality, it did not have the necessary majority to overrule prior Supreme Court precedence. Nor was *Bolling v. Sharpe*, addressed by Justice Brennan in the *Metro Broadcasting* case. This Honorable Court would not overrule such an important constitutional precedent by implication.

Finally, the portion of the *Croson* decision which is cited in *Metro Broadcasting* for the proposition that Congress is treated differently by the Constitution than other governmental bodies, was not a plurality opinion nor a majority opinion. There are no majority Supreme Court decisions that support the holding of the Tenth Circuit in the case at bar. The decision of the Tenth Circuit is clearly in conflict with *Bolling v. Sharpe*.

To resolve this true and direct conflict with *Bolling v. Sharpe*, this Petition must be granted.

II. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS RAISES IMPORTANT CONSTITUTIONAL ISSUES.

This is an important challenge to the constitutionality of a race-based, set-aside program adopted by Congress.[23] It asks unanswered questions as to the exact relationship among the decisions of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) and *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990).

While *Fullilove* upheld, in strictly a facial challenge, the ability of Congress to adopt race-based, set-aside programs; while *Croson* struck down a race-based, set-aside program adopted by a city; and while *Metro Broadcasting*, appears to have established an intermediate standard of review for congressionally-mandated acts; unanswered are the questions regarding an "as applied" challenge posed by the instant Petition, which Chief Justice Burger stated in *Fullilove* would have to await future challenges.[24] This is that "future case[ ]."

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[23] "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." *Fullilove*, 448 U.S. at 523, (Justice Stewart, dissenting opinion).

[24] "We are not presented here with *a challenge involving a specific award of a construction contract* or the denial of a waiver request; such questions of specific application must await future cases." *Fullilove*, 448 U.S. at 486. (Emphasis added.)

This case presents the unanswered questions: (1) Whether, in a facial and as applied constitutional challenge, a law that is an equal protection violation when enacted by a state is transformed into an equal protection guarantee when enacted by Congress?[25] (2) Whether "strict scrutiny" as opposed to "a lenient standard, resembling intermediate scrutiny" is the proper standard of review for determining the constitutionality of a race-based program adopted by Congress? (3) Whether the Fifth Amendment requires a federal agency, in implementing a federal race-based, set aside program, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989), especially when the level of minority participation set by the agency far exceeds the level of participation required by Congress? At the time of the West Dolores contract award, the CFLHD's goal was set at 12% to 15% of its annual construction budget, that is, 7% to 10% higher than set by Congress in the SBA. App. 49.

Croson commands that a governmental unit, even if implementing a congressionally-mandated program, conduct an inquiry in order to ascertain that the

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[25] In stating a concern with the holding of the Court in *Fullilove*, Justice Kennedy, in a concurring opinion in *Croson*, stated: "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case." *Croson*, 488 U.S. at 518.

implementation of a race-based program above that set by Congress meets the requirements of the Constitution.[26]

While the SBA may require the CFLHD to implement a race-based remedy, when the CFLHD exceeds that level, it must do so in a constitutional manner. The Fifth and Fourteenth Amendments to the U.S. Constitution compel the CFLHD to make the decision to raise the level at which the race-based quota is set in a constitutional manner. The constitutional method is set forth in *Croson*. The failure of the CFLHD to determine whether 12 to 15% as opposed to 5% was constitutionally permissible renders the CFLHD program unconstitutional.

This Court should grant certiorari in order to end the Constitutional abuse now sanctioned by the decision below.

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[26] As this Court made clear in *Croson*, a state must: (1) search for and find a history of state-sponsored discrimination; (2) assert the compelling state interest sought to be served by the race-based remedy; and (3) narrowly tailor the race-based remedy both as to: (a) the beneficiary of the racial bias, that is, applying the remedy to one who has been a victim of such state-sponsored discrimination; and (b) the duration of the race-based remedy. *Croson*, 488 U.S. 469.

CONCLUSION

For all of the above reasons, this Court should grant the petition of Adarand in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: May 17, 1994.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation, Plaintiff-Appellant v. FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSON, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division, Defendants-Appellees	)	No. 92-1242

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 90-C-1413)

(Filed Feb. 16, 1994)

William Perry Pendley, Mountain States Legal, Foundation (Todd S. Welch, John G. Nelson, with him on the brief), Denver, Colorado, for Plaintiff-Appellant.

Lisa J. Stark, Attorney, Civil Rights Division, United States Department of Justice (James P. Turner, Acting Assistant Attorney General, David K. Flynn, Lisa C. Wilson, Attorneys, Civil Rights Division, United States Department of Justice, on the brief), Washington, D.C., for Defendants-Appellees.

Before HOLLOWAY, GARTH* and McKAY, Circuit Judges.

GARTH, Circuit Judge.

This appeal involving a reverse discrimination challenge requires us to review the constitutionality of a federal program designed to provide contract awards for disadvantaged business enterprises.

Appellant Adarand Constructors, Inc. ("Adarand") appeals an order of the district court granting summary judgment in favor of the Government appellees [hereinafter "Government"]. 790 F. Supp. 240. On appeal, Adarand raises three arguments. First, it argues that the district court erred in holding that the proper standard to be applied is found in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), rather than in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

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* The Honorable Leonard I. Garth, Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Second, relying on *Croson*, Adarand asserts that the Central Federal Lands Highway Division (CFLHD) must make specific findings of past discrimination in order to justify its reliance on the disadvantaged business enterprise (DBE) program which furnishes the necessary criteria for the federal agency's implementation of a race-conscious subcontracting compensation clause ("the SCC program").

Third, Adarand contends that section 502 of the Small Business Act, 15 U.S.C. § 644(g), which provides the statutory authorization for the challenged SCC program, is unconstitutional as applied because it impermissibly delegates to federal agencies the authority to develop minority-participation goals and the means for achieving those goals.

Our jurisdiction is invoked under 28 U.S.C. § 1291, and we affirmed the district court's judgment of April 21, 1992 for the Government. We do so, however, on grounds different from those relied upon by the district court.[1]

I.

Adarand, a highway construction company run by a white male, sought declaratory and permanent injunctive relief against officials of the federal Department of Transportation (DOT) and other DOT officials on the grounds that the SCC program utilized by the CFLHD violates the

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[1] *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("[T]he rule is settled that if the decision below is correct, it must be affirmed, although the district court relied upon a wrong ground or gave a wrong reason").

equal protection guarantees of the Fifth and Fourteenth Amendments and the privileges and immunities guaranteed by 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI).[2] Adarand's complaint erroneously alleged that the statutory authorization for the SCC program was provided by two transportation assistance acts: the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (STAA), and its successor, the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (STURAA). Both Adarand and the Government filed cross motions for summary judgment with the district court. The district court also mistakenly determined that the challenged program was authorized by STAA and STURAA. For purposes of this appeal, both parties stipulate that the SCC program is authorized by section 502 of the Small Business Act, 15 U.S.C. § 644(g), and that the constitutionality of STAA and STURAA are not at issue.

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[2] For ease in reading the various references to acts and agencies referred to within this opinion, we list the following acronyms:

Central Federal Lands Highway Division	= CFLHD
Federal Lands Highway Program	= FLHP
Federal Highway Administration	= FHWA
Federal Department of Transportation	= DOT
Disadvantaged Business Enterprise	= DBE
Subcontracting Compensation Clause	= SCC
Surface Transportation Assistance Act of 1982	= STAA
Surface Transportation and Uniform Relocation Act of 1987	= STURAA

A.

The Small Business Act provides the statutory authority for agencies to establish specific utilization goals for disadvantaged small businesses. 15 U.S.C. § 644(g). In compliance with section 502 of the Small Business Act, the heads of the various federal agencies, including the DOT, must establish annual goals for small business participation in federal procurement contracts.[3] *Id.* § 644(g)(2). These goals must present the "maximum

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[3] Section 502 of the Small Business Act provides:

> The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business contracts shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards. *Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.* The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract

practicable opportunity" for small business concerns, including those "owned and controlled by socially and economically disadvantaged individuals." *Id.* § 644(g)(1).

The SCC program was implemented in 1979 by the Federal Lands Highway Program (FLHP) of the Federal Highway Administration (FHWA), an agency within the DOT, to satisfy the agency goals requirement of the Small Business Act. CFLHD and the other two regional offices of FLHP utilize the SCC program as a means of meeting their respective apportioned shares of the DOT goal for disadvantaged small business participation. Under the SCC program, a Subcontracting Compensation Clause is included in small-value contracts or where the prime contractor is a small business. Prime contractors whose

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goal established by the President pursuant to this paragraph.

15 U.S.C. § 644(g)(1) (emphasis added). These obligations were first codified in 1978 as an amendment to the Small Business Act. *See* Pub. L. No. 95-507, 92 Stat. 1770.

Pursuant to 15 U.S.C. 644(g)(2):

> The head of each Federal agency shall, after consultation with the Administration establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency. *Goals established under this subsection* shall be jointly established by the Administration and the head of each Federal agency and *shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts.* * * *

Id. (emphasis added).

DBE subcontracts exceed 10% of the overall contract amount are eligible for incentive payments of up to 1.5% of the original contract amount for utilization of one DBE, or up to 2% for hiring two or more DBEs. Small business prime contractors are not required to hire DBEs as a contractual condition of eligibility for award of the prime contract. Rather, the SCC program provides prime contractors with the option of either hiring DBE subcontractors and receiving commensurate incentive payments, or ignoring the option entirely.

To qualify for eligibility under the SCC program, small businesses must demonstrate through an annual certification process that they are indeed socially and economically disadvantaged. The Subcontracting Compensation Clause and the eligibility criteria comport with section 502 of the Small Business Act. The eligibility criteria, however, are derived from the DBE regulatory program implemented pursuant to two transportation funding authority acts: STAA and its renewal act, STURAA.[4] A subcontractor thus qualifies for the SCC program if it qualifies for DBE status under STURAA regulations.

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[4] The regulations promulgated by the DOT following enactment of STAA in 1983 created the DBE regulatory program. Both STAA and STURAA were intended to achieve minority business participation goals primarily through the use of set-asides for qualified subcontractors. S. Rep. No. 4, 100th Cong., 1st Sess. 11-12 (1987), *reprinted in* 1987 U.S.C.C.A.N. 66, 76. STURAA allocates $55 million annually for forest highway construction projects undertaken by federal agencies. The bulk of funds appropriated under STURAA, however, is granted to state and localities for federally-assisted highway programs.

As an agency within the federal DOT, CFLHD is not itself subject to STURAA implementing regulations. *See* 54 Fed. Reg. 43835-01; 45 Fed. Reg. 21172 (1980); 49 C.F.R. 23.2. Consequently, small business prime contractors awarded contracts let directly by the CFLHD do not have to satisfy the 10% DBE set-aside required of states and localities who receive STURAA funds for federally-assisted highway contracts.

STURAA, and previously STAA, define "socially and economically disadvantaged individuals" with reference to the Small Business Act. 15 U.S.C. § 637(d).[5] Under the Small Business Act, a small business must be at least 51% owned and controlled by individuals who are socially and economically disadvantaged. *Id.* Members of certain minority racial and ethnic groups and women are presumed socially and economically disadvantaged.[6] *Id.* That

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[5] Under the Act, "[s]ocially disadvantaged individuals are those that have been subject to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A). These definitions also are incorporated into STAA and STURAA.

[6] These racial minority groups are: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * * ." 15 U.S.C. § 637(d)(3)(C). Both STURAA and the Small Business Act also extends federal procurement opportunities to women-owned small businesses.

presumption is rebuttable under the DBE criteria incorporated into CFLHD's SCC program. Both minority-owned small disadvantaged business enterprises (DBEs) and women-owned small business enterprises (WBEs) may be decertified if it can be established that they are not socially and economically disadvantaged. Non-minority-owned small businesses also are eligible for DBE certification by the Small Business Administration, provided that they satisfy the same eligibility criteria as minority-owned small businesses. *See* 15 U.S.C. § 637(a).

B.

On September 15, 1989, the CFLHD awarded a $1-million-plus prime contract to a small business contractor, Mountain Gravel & Construction Company, for a federal highway project in Colorado known as the West Dolores project.[7] Funding for the West Dolores project was allocated to CFLHD under STURAA. Because the contract was let by an agency within the DOT, Mountain Gravel was *not required* to hire DBEs as part of its contractual obligation for the West

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[7] CFLHD includes within its jurisdiction the following states: Arizona, California, Colorado, Hawaii, Kansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming. At the time of the contract award for the West Dolores Project, CFLHD's apportioned goal was between 12% and 15% DBE participation in all contracts let by the agency. The percentage goal represents the portion of dollars of CFLHD's total procurement program. Neither CFLHD nor any other federal agency is subject to sanctions for failing to satisfy its annual goal. The head of each federal agency, however, is required to justify any such failure in an annual report to the Small Business Administration. 15 U.S.C. § 644(h).

Dolores project. However, anticipating that Mountain Gravel would use DBEs as subcontractors, CFLHD followed its usual practice and added 1% of the bid as a contingent sum to the prime contractor's bottom-line bid. This contingent amount would be paid to the prime contractor only if 10% of the subcontracts on the West Dolores Project was with DBEs. The Subcontracting Compensation Clause included in the contract read:

> Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals * * * Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring the necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. * * * The Contractor will become eligible to receive payment under this provision when the dollar amount * * * of the DBE subcontract(s) awarded exceeds [10% for Colorado] of the original [prime] contract award.

Shortly thereafter, Adarand submitted a subcontract bid to Mountain Gravel seeking to construct the guardrail portion of the West Dolores project. Adarand is not a certified DBE.[8] Although Adarand was the lowest bidder, Mountain Gravel exercised the option provided by the

[8] The record gives no indication of the racial composition of Adarand's ownership, although its general manager is a white male and its stockholders include the general manager's wife and two other women.

SCC program and awarded the subcontract for the guardrail systems to a certified DBE who had submitted a higher bid than Adarand's. By subcontracting with the DBE, Mountain Gravel thereby became entitled to a bonus payment of approximately $10,000.

Adarand challenged the constitutionality of the SCC program in a lawsuit filed August 10, 1990. The complaint, *inter alia*, sought an injunction prohibiting further use of the SCC program. Believing that the SCC program was instituted pursuant to STAA and STURAA, Adarand's complaint attacked the constitutional validity, both facially and as applied, of those two transportation assistance acts. The complaint alleged that the use of race and gender as factors in awarding federal procurement contracts in Colorado, without any findings of past discrimination in the state, violated the equal protection guarantees of the Fifth and Fourteenth Amendments and the privileges and immunities guaranteed by 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI).

In its brief in support of its cross motion for summary judgment, Adarand argued that CFLHD's use of the SCC program to facilitate federal contracting opportunities for DBEs could not withstand strict scrutiny under *Croson*. The Government countered in its brief that *Fullilove* (involving *federal* remedial programs), and not *Croson* (involving *state* and *local* entities), provided the controlling standard. The Government also argued that Adarand did not have standing, in any event, to challenge the regulatory program by which STURAA is implemented, because the SCC program was instituted pursuant to section 502 of the Small Business Act, 15 U.S.C. § 644(g), and not STURAA. In its reply brief,

Adarand acknowledged that the SCC program was implemented to response to the agency goals requirement of the Small Business Act.

Relying on the parties' briefs, the district court granted summary judgment in favor of the Government and denied Adarand's summary judgment motion. 790 F. Supp. at 245. The district court assumed, without explanation, that the case presented a challenge to the constitutionality of the DBE regulatory program promulgated under provisions of STAA and STURAA. *Id.* at 242. Its opinion did not address the standing issue urged upon us by the Government, and made no reference to the SCC program. The existence of the Small Business Act and the Act's mandate of agency goals for socially and economically disadvantaged small business participation were virtually ignored by the district court. Rather, the district court concluded, erroneously, that CFLHD "was required by the federal regulations under which CFLHD operates" to adopt STAA's and STURAA's 10% set-aside.[9] *Id.* at 244.

Based on its finding that "the challenged regulations and actions involve only federal actors acting pursuant to congressional mandate," the district court determined that the relaxed standard of *Fullilove* – and not the strict scrutiny test of *Croson* – governed this case. 790 F. Supp.

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[9] The 10% (7% for Wyoming) threshold of CFLHD's subcontracting compensation clause, although modeled on STURAA's set-aside, is an optional goal, not a set-aside. As discussed *supra* in text, it is entirely at the discretion of the prime contractor whether to exercise its option under the Subcontracting Compensation Clause, or to ignore it and forego the monetary reward CFLHD offers for hiring DBEs as subcontractors.

at 244. Applying *Fullilove* to the facts of this case, the district court found that congressional policies related to remedying discrimination supported the Government's position. Because "the challenged programs are narrowly tailored to achieve their legitimate purpose," the district court concluded that the challenged program satisfies the requirements of the Fifth and Fourteenth Amendments. *Id.* at 245.

II.

As a threshold matter, we reject the Government's argument that Adarand does not have standing to challenge section 502 of the Small Business Act, 15 U.S.C. § 644(g), because Adarand had not charged in its complaint that section 502 was unconstitutional. We are satisfied that Adarand is entitled to attack the constitutional validity of the legislation authorizing the very program which was challenged in its complaint, even though Adarand did not identify section 502.

Adarand and the Government, in their briefs to the district court, both identified section 502 as the statutory basis for the SCC program. As the Government itself points out, the analysis of the constitutionality of the SCC program under the authority of the Small Business Act is the same as that applied by the district court to STAA and STURAA. Furthermore, because we conclude that the district court reached the correct conclusion, its order denying Adarand's motion for summary judgment and granting summary judgment in favor of the Government can be affirmed, even though premised on an analysis different from the analysis we employ. *Helvering v.*

Gowran, 302 U.S. 238, 245 (1937), *reh'g denied*, 302 U.S. 781 (1938); *Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n of Kansas*, 753 F.2d 857, 862 n.5 (10th Cir. 1985).

The Government is on firmer footing when it attacks Adarand's standing to challenge the provisions of the SCC program pertaining to women-owned business enterprises (WBE). The issue of whether a congressional mandate exists for WBEs as disadvantaged businesses under the SCC program also was raised in Adarand's complaint. Both parties, however, proceeded before the district court on the apparently shared assumption that the instant controversy concerned only the racial preference aspect of the SCC program. Because Adarand never argued the point in its motion for summary judgment, the district court was never afforded an opportunity to evaluate the merits of the WBE claim. Moreover, Adarand did not press this point during arguments before us.

More significantly, Adarand has made no showing that it has a personal stake in the WBE provisions. It offers no evidence whatsoever that it has been denied a federal subcontract because of a WBE, or that the gender preference of the SCC program prevents it from now bidding on an equal basis for federal subcontracts. For these reasons, we limit our review only to the constitutionality of the SCC program's racial preference. *See Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993).

III.

A.

We turn now to the merits of the appeal. Once again we are asked to determine the proper constitutional test for a race-conscious program implemented pursuant to a congressional command. As in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir.), *cert. denied sub nom. Ellis v. Card*, 113 S. Ct. 374 (1992), resolution of this appeal turns on the question of whether the district court erred in applying the *Fullilove* standard, rather than the *Croson* test, to the facts of this case. Our decision in *Ellis* provides the answer: *Fullilove* controls.

In *Fullilove*, 448 U.S. 448 (1980), the Supreme Court approved the use of a 10% minority business enterprise (MBE) set-aside mandated by Congress. In rejecting a facial challenge to the constitutionality of the statute authorizing the MBE program, the Court found that Congress acts within its unique and broad powers under the Commerce Clause and section 5 of the Fourteenth Amendment when it imposes an affirmative action program to remedy nationwide discrimination in the construction industry. Under *Fullilove*, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality.[10]

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[10] The test of Chief Justice Burger's opinion for the Court is: (1) whether "the *objectives* of this legislation are within the power of Congress"; and (2) whether "the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due

In *Ellis*, we applied the *Fullilove* test in upholding the constitutionality of the DBE program, as applied by the Utah Department of Transportation as a prerequisite to the receipt of federal funds. 961 F.2d at 916. In *Ellis*, we were called upon to decide "whether Utah's failure to seek a waiver is equivalent to a local government enacting its own set-aside program, thus implementing the fact-finding requirements of *Croson*." *Id.* at 915. We held that it was not.

Although our analysis in *Ellis* focused on the waiver provisions of the DBE program established by STAA and renewed by STURAA, our opinion made clear that *Fullilove* provides the proper test for determining the constitutionality of a race-conscious measure authorized by Congress. Because the white contractor in *Ellis* stipulated that both STAA and STURAA and their implementing regulations were facially constitutional, we necessarily concluded that Utah was simply obeying a valid congressional command. Holding that Utah had complied with federal law, we stated that, under such circumstances, " '[W]e do not see how the state can be thought to have violated the Constitution.' " 961 *F.2d* at 916 (quoting *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th

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Process Clause of the Fifth Amendment." *Fullilove*, 448 U.S. at 473 (Opinion of Burger, C.J.). Three other members of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster under the Fifth and Fourteenth Amendments. *Id.* at 519 (Marshall, J., concurring in judgment). A majority of the *Fullilove* Court therefore agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress.

Cir.), *cert. denied*, 111 S. Ct. 2261 (1992)); *accord Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

In the instant case, Adarand acknowledges that if the CFLHD is merely doing what Congress ordered it to do, the agency's action is constitutional unless the underlying legislation is unconstitutional. For purposes of this appeal, Adarand has stipulated that section 502 of the Small Business Act (15 U.S.C. § 644(g)) provides the statutory authority for the SCC program, and that section 502 satisfies the evidentiary requirements of *Fullilove*. Adarand also concedes that the CFLHD's utilization of the SCC program is not beyond the agency's delegated power under section 502. The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress.

We disagree with Adarand's argument that *Croson* prevents the CFLHD from playing the role envisaged for it by the Small Business Act. The question of congressional action was not before the Court in *Croson*. In *Croson*, the Supreme Court held that a strict level of scrutiny must be applied to *state* or *local* public minority preference programs. Justice O'Connor's opinion, joined by Chief Justice Rehnquist and Justice White, explicitly distinguished *Fullilove* on the grounds that state and local governments have no constitutional mandate similar to or equal to Congress's specific constitutional mandate under section 5 to enforce the Fourteenth Amendment. Rather, section 1 of the Fourteenth Amendment took

power away from the states and gave it to Congress. 488 U.S. at 490 (Opinion of O'Connor, J.).

B.

Adarand cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements.[11] In contrast to the situation in *Croson*, no state procurement or minority business policy is implicated by Adarand's claims. If particularized findings to justify implementation of a federal remedial program are not required of a state, *Ellis*, 961 F.2d at 916, they clearly are not required of a federal agency, such as CFLHD, which Adarand concedes is obligated to administer the remedial program.

The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities. *Ellis*, 961 F.2d at 915-16. The validity of that proposition was reaffirmed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, *reh'g denied*, 497

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[11] The principal circuit opinion upon which Adarand relies – *H.K. Porter Co. v. Metropolitan Dade County*, 975 F.2d 762 (11th Cir. 1992) – was recently vacated on the joint motion of the parties and remanded for dismissal of the action by the district court. 998 F.2d 892 (11th Cir. 1993). That case, in any event, was inapposite; it dealt with a *local* set-aside program and never addressed the issue of a *federal* agency's implementation of a statutory directive.

U.S. 1050 (1990), where the Court put to rest any lingering doubts about the continuing vitality of *Fullilove*:

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, must of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

Id. at 565. Indeed, the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.[12]

C.

By its enactment of section 502, Congress accorded broad discretion to agencies to implement the remedial goals of the Small Business Act. Although Congress did not dictate specific percentage goals for agencies to meet, the language of section 502 clearly contemplates that

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[12] *Metro Broadcasting* concerned two programs through which the Federal Communications Commission chooses the owner of a broadcast station partly on the basis of an applicant's race, ethnicity, or surname. In sustaining the program against an equal-protection attack, the Supreme Court first considered the stated aim of the government's program ("enhancing broadcast diversity") and held that this interest qualifies as a sufficiently important governmental goal. 110 S. Ct. at 3008-09. Because the program was substantially related to achievement of that objective, it satisfied equal protection requirements.

agencies will exceed the government-wide DBE participation goal of "*not less* than 5 percent." 15 U.S.C. § 644(g)(1) (emphasis added). The legislative history also evidences Congress's intention that each agency establish DBE goals above the 5% government-wide goal established by the President. H.R. Rep. No. 100-1070, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5401, 5507. The SCC program is promulgated pursuant to this specific congressional delegation. In implementing the SCC program, CFLHD thus did exactly what Congress explicitly directed it to do: provide a means to ensure "*the maximum practicable opportunity*" for disadvantaged small business participation in federal procurement. 15 U.S.C. § 644(g) (emphasis added).

Adarand's argument that the racial preference of the SCC program is a discretionary agency action ignores the entity which created the presumption of minority disadvantage. The challenged SCC program derives its eligibility criteria from STAA and STURAA, which in turn incorporated the presumption of section 8(d) of the Small Business Act, 15 U.S.C. § 637(d)). Under section 8(d), a small "socially and economically disadvantaged" business is one that is at least 51% "owned by one or more socially and economically disadvantaged individuals," and "whose management and daily business operations are controlled by one or more of such individuals." *Id.* § 637(d)(3)(C). Section 8(d) presumes "that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * * ." *Id.* By incorporating that presumption into STAA and STURAA, Congress reaffirmed its mandate that federal

procurement opportunities be made more readily available to qualified minority-owned business enterprises. That rebuttable presumption also is found in the challenged SCC program. The SCC program thus provides subcontracting opportunities for the very type of small businesses that Congress had in mind when it enacted section 502 of the Small Business Act.

The conclusion that the CFLHD is acting within the bounds of the statutory authority of the Small Business Act is impelled by Adarand's own concession that the CFLHD's implementation of the SCC program was not beyond the agency's delegated power under section 502. Because the SCC program comports with the legislative design of the Small Business Act to increase subcontracting opportunities for minority-owned small businesses, it is reasonably related to the purposes of the enabling legislation. *Cf. Hecla Mining Co. v. United States*, 909 F.2d 1371, 1375-76 (10th Cir. 1990) ("[W]hen Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting agency action is entitled to deference") (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

We also disagree with Adarand's argument that Congress must mandate precise percentage goals for minority small business participation. Such a position ignores the principal lesson of *Fullilove*. The splintered *Fullilove* court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and

ethnic preference, satisfied equal protection requirements. 448 U.S. at 480 (Opinion of Burger, C.J.). In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the " 'great weight' " given to decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted).

D.

Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program implemented by the CFLHD is narrowly tailored to achieve the remedial purpose of section 502. We hold that it is.

The program upheld in *Fullilove* was the model for the DBE program implemented by the DOT pursuant to STAA and STURAA, and utilized in the SCC program challenged by Adarand. Although the district court mistakenly treated the challenged program as being authorized STAA and STURAA, its analysis is equally applicable in assessing the constitutionality of the SCC program under the authority of section 502 of the Small Business Act.

The district court found that the challenged program satisfied *Fullilove* because it serves important governmental objectives and is substantially related to achievement of those objectives. 790 F. Supp. at 244. The district court concluded that the challenged program was narrowly tailored to achieve its statutory objectives because

it does not mandate its provisions in an inflexible manner. It ensures minimum impact on non-DBEs because

> [t]o qualify for DBE status a business must demonstrate, via the annual certification process, that it is a bona fide DBE, eligible to participate in the program. This annual certification mechanism is reasonably calculated to insure legitimate, qualified participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBE's. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBE status may apply for certification and establish their qualifications to participate.

Id.

We hold that the SCC program is constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises, as required under section 502 of the Small Business Act. The qualifying criteria of the SCC program is not limited to members of racial minority groups. Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive since minority businesses that do not satisfy the economic criteria cannot qualify for DBE status. Furthermore, the SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "resassessment and reevaluation by Congress." *See Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.).

Significantly, the SCC program does not require small business prime contractors to submit and adhere to a subcontracting plan with specific DBE goals. The prime contractor in this case had the option, not the obligation, of subcontracting with a DBE; it exercised its own judgment (albeit attracted by CFLHD's monetary inducement) in rejecting Adarand's bid for the subcontract. Because the SCC program induces, rather than compels, prime contractors to hire DBE subcontractors, it cannot be said to violate equal protection requirements. As *Fullilove* teaches, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms." 448 U.S. at 484.

IV.

Having rejected Adarand's arguments, and having held that the district court did not err in relying on *Fullilove* rather than *Croson*, that accordingly, no *Croson* findings were necessary, and that the Small Business Act which authorized the SCC program meets constitutional requirements, we will affirm the district court's order of April 21, 1992 in favor of the Government.

AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294
(303) 844-3157

ROBERT L. HOECKER
CLERK

PATRICK FISHER
CHIEF DEPUTY

February 16, 1994

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Re: 92-1242, Adarand Constructors v. Skinner
Lower docket: 90-C-1413

Dear Counsel:

Enclosed is a copy of the opinion of the court in the captioned case. Judgment in accordance with the opinion has been entered today.

Please call this office if you have questions.

Sincerely,

ROBERT L. HOECKER
Clerk

By: /s/ Beth Morris
Deputy Clerk

RLH:mbm

cc:
Honorable Jim R. Carrigan, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 90-C-1413

ADARAND CONSTRUCTORS, INC.,

Plaintiff,

v.

SAMUEL K. SKINNER, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Apr. 21, 1992)

CARRIGAN, J.

Plaintiff Adarand Constructors, Inc. (Adarand), a Colorado corporation, commenced this action to challenge the constitutionality of the federal Disadvantaged Business Enterprise (DBE) program. Defendants are Samuel K. Skinner, Secretary of the Department of Transportation (DOT); Thomas D. Larson, Administrator of the Federal Highway Administration (FHA); Louis N. MacDonald, Administrator of Region VIII of the FHA; and Jerry Budwig, Division Engineer of the Central Federal Lands Highway Division (CFLHD). Presently pending is the plaintiff's motion for summary judgment seeking a permanent injunction against the DOT, the FHA and the CFLHD and a declaratory judgment ruling the federal DBE program unconstitutional both on its face and as applied. Also pending is the defendants' cross motion for

summary judgment seeking a ruling that the DBE program and its implementation are constitutional.

The parties have fully briefed the issues and oral argument would not materially facilitate the decision process. An *amicus curiae* brief has been filed by The Rocky Mountain Enterprise Legal Defense Fund. Jurisdiction exists under 28 U.S.C. § 1331 and § 1343.

I. Facts and Procedure.

On September 11, 1989, Adarand[1], a non-DBE guardrail subcontracting business submitted the lowest subcontract bid for a portion of guardrail work on the West Delores County, Colorado highway project. Plaintiff's bid was rejected and a DBE who had submitted a higher bid was awarded the subcontract.

This action was brought under 42 U.S.C. §§ 1983 and 2000(d) to challenge the constitutional validity of the DBE program promulgated under federal highway funding provisions of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424 § 105(f), 96 Stat. 2097 (STAA) and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17 § 106(c), 101 Stat. 132 (STURAA). *See also* 49 C.F.R. §§ 23 *et seq.* Specifically, the plaintiff challenges the DBE program[2] as administered by the CFLHD within Colorado.

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[1] Adarand is managed by Randy Pech, a white male. Its stockholders include Valery J. Pech (Randy Pech's wife), Steven M. Goeglein, Ruth Pech and Linda Cosden.

[2] The challenged DBE program is not exclusively a race-conscious program. The program includes women owned businesses as well as other "disadvantaged" businesses. Thus, the plaintiff's contention that the DBE program awards contracts solely on the basis of race is incorrect.

II. Analysis.

STAA and STURAA create federal programs designed to benefit socially and economically disadvantaged business enterprises. Section 105(f) of STAA and § 106(c) of STURAA both provide in pertinent part: "[e]xcept to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(a) of the Small Business Act (15 U.S.C. § 637(a))." Pub.L. 97-424 § 105(f), Pub.L. 100-17 § 106(c).

The CFLHD, as a recipient of federal highway funds, participates in this program.[3] Discrimination based on race, color, national origin or sex in the award or performance of federal contracts under STAA and STURAA is prohibited, and participating agencies are directed to "take all necessary and reasonable steps . . . to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts." 49 C.F.R. §§ 23.7 and 23.43. States or federal agencies may award less than ten percent of such contracts to DBE's upon application to and approval by the Secretary of Transportation. 49 C.F.R. §§ 23.64(e), 23.65 and Part 23 Subpart D, Appendix D (1989).

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[3] The CFLHD includes all or parts of Arizona, California, Colorado, Hawaii, Kansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming.

Federal regulations promulgated in response to STAA and STURAA define DBE's as small businesses which are at least fifty-one percent owned and managed by disadvantaged individuals.[4] 49 C.F.R. § 23.62. These businesses qualify for DBE designation as well as preferential consideration in the award of subcontracts on federal highway projects. *Id.* Such businesses must be certified annually as "disadvantaged" and they maintain that status unless and until decertified by the participating state or agency. 49 C.F.R. § 23.51. Businesses not entitled to be presumed eligible for DBE status may apply and, upon sufficient showing, become certified by the Small Business Administration or the state as qualified for that status. Small Business Act § 8(a), 15 U.S.C. § 637(a).

Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by *City of Richmond v. Croson*, 488 U.S. 469 (1989). Defendants' motion for summary judgment seeks a ruling that the DBE program and its implementation are constitutional under *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting v. F.C.C.*, 110 S.Ct. 2997 (1990).

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[4] The category of disadvantaged individuals under 49 C.F.R. § 23.62 is rebuttably presumed to include "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Asian-Indian Americans."

Summary judgment is proper if the pleadings, depositions and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. The party opposing a properly supported summary judgment motion may not rest upon the mere allegations of the complaint, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Because no genuine issues of material fact are here disputed, this matter is ripe for decision on the pending cross motions for summary judgment.

In *Croson*, the Supreme Court held that, when instituting race-conscious measures, states and local government entities must make findings of prior discrimination. *Croson*, 488 U.S. at 490. Because no specific findings were made as to past discrimination, the City of Richmond's thirty percent minority set-aside program failed to satisfy strict scrutiny analysis and, therefore, was held unconstitutional.

Defendants distinguish *Croson* from the instant case noting that, unlike *Croson*, the defendants here are all federal actors. Defendants not that Justice O'Connor, in part of the *Croson* opinion in which she was joined by Chief Justice Rehnquist and Justice White, distinguished *Croson* from *Fullilove* by noting that "Congress may identify and redress the effects of society-wide discrimination [and] need not make specific findings of discrimination." *Id.* Defendants argue that *Fullilove* controls here.

In *Fullilove*, the Court, in upholding a federal funding program, stated that deference to the legislative authority of Congress under the Commerce Clause, the Spending Clause and the Civil War Amendments was appropriate. *Fullilove*, 448 U.S. at 475-478 (citations omitted). The Court specifically stated that:

> "[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the general Welfare of the United States' and 'to enforce, by appropriate legislation' the equal protection guarantees of the Fourteenth Amendment". *Id.* at 472 (citations omitted).

Similarly, in the more recent decision of *Metro Broadcasting*, the Supreme Court upheld the constitutionality of a federal agency minority preference program stating that:

> "benign race-conscious measures mandated by Congress – even when those measures are not 'remedial' . . . are constitutionally permissible to the extent that they serve important government objectives within the power of Congress and are substantially related to the achievement of those objectives." *Metro Broadcasting*, 110 S.Ct. at 3000.

The Court found of "overriding significance" the fact that the minority program was "specifically approved – indeed, mandated – by Congress." *Id.* at 3008-09. *See also Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F.Supp. 1303, 1314 (W.D.Mich. 1991) (upholding a state's application of the STAA and STURAA programs).

Croson is readily distinguishable from *Fullilove* and *Metro Broadcasting*. *Croson* did not address the issue of *congressional* action but decided what procedures state and local government entities must follow in evaluating minority public works programs. *Croson* specifically provided "[t]hat [because] Congress may identify and redress the effects of society wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." *Croson*, 488 U.S. at 490.

It is clear under these cases that race-conscious classifications established by Congress are subject to a standard of review different from that applicable to similar classifications prescribed by state and local governments. The Supreme Court has declared:

> "*Croson* cannot be read to undermine [the] decision in *Fullilove*. In fact much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting*, 110 S.Ct. at 3009.

The overriding distinction between the program upheld in *Fullilove* and the instant program, when compared to the program held unconstitutional in *Croson*, is undoubtedly the congressional mandate behind the *Fullilove* program and this one. Further, the ruling and effect of *Fullilove* are clearly acknowledged in *Croson*. *Croson*, 488 U.S. at 491.

Thus *Fullilove*, *Croson* and *Metro Broadcasting* teach that "the federal government can, by virtue of the

enforcement clause of the Fourteenth Amendment, engage in affirmati··e action with a freer hand than states and municipalities." *Michigan Road Builders,* 761 F.Supp. at 1314 (*citing Milwaukee County Pavers Association v. Fiedler,* 922 F.2d 419, 423-24 (7th Cir. 1991)). Nothing in the above cases demands that the federal government assess incidents of past discrimination in all areas of the country where federal programs apply.

Rather these and other cases recognize that Congress is specifically empowered to remedy the effects of disabling discrimination, remove such barriers and "enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. *Fullilove,* 448 U.S. at 456-472, 476; *Croson,* 488 U.S. at 484-508. *See also Wygant v. Jackson Board of Education,* 476 U.S. 267, 277 (1985) (plurality opinion); *Michigan Road Builders,* 761 F.Supp. at 1313-14; *Ellis v. Skinner,* 753 F.Supp. 329 (D. Utah 1990).

The STAA, STURAA and DBE programs whose constitutionality is here attacked were authorized by Congress and mandated for all agencies and states which receive funds under them. Neither CFLHD nor its subparts in Colorado independently adopted the ten percent set-aside. Rather, it was required by the federal regulations under which CFLHD operates. Thus the mere fact that CFLHD implements a federal program within Colorado does not convert it into a state program requiring *Croson*-type analysis. Accordingly, *Croson* is not controlling here because the challenged regulations and actions involve only federal actors acting pursuant to congressional mandate. Rather *Fullilove* and *Metro Broadcasting* control.

In determining the constitutionality of the challenged DBE program, it must be demonstrated that the program serves important governmental objectives and that it is substantially related to achievement of these objectives.[5] *See Fullilove,* 488 U.S. at 473-475 and 480-492. Although Congress made no specific findings on the subject, the Court in *Fullilove* was satisfied, as I am here, that Congress had "abundant historical basis from which it could conclude" such findings sufficient to demonstrate important governmental objectives underlying the program. *Id.* at 478.

Because I am satisfied that the instant program serves appropriate governmental objectives, the question becomes whether it is narrowly tailored to achieve the objectives of STAA and STURAA without violating constitutional guarantees. The DBE program must be analyzed to assure that it does not mandate its provisions in an inflexible manner and that it successfully ensures minimum impact on non-DBEs. *See Id.* at 480; *Metro Broadcasting,* 110 S.Ct. at 3027-28.

To qualify for DBE status a business must demonstrate, via the annual certification process, that it is a bona fide DBE, eligible to participate in the program. 49 C.F.R. § 23.62 and Part 23, Subpart D, Appendix C. This annual certification mechanism is reasonably calculated

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[5] The Supreme Court in *Fullilove* noted that "[section] 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Fullilove,* 448 U.S. at 476.

to insure legitimate, qualified participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBE's. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBE status may apply for certification and establish their qualifications to participate. *Id.* Finally, waiver of the mandatory ten percent minimum is provided through a state or agency's application to and approval by the Secretary of Transportation. 49 C.F.R. §§ 23.64(e), 23.65 and Part 23, Subpart D, Appendix D.

Plaintiff correctly points out that the CFLHD is required to comply fully with the Fifth and Fourteenth Amendments to the constitution. However, the plaintiff's assertion that CFLHD has failed to comply with applicable regulations is not supported by evidence.

It is significant that the instant legislation and resulting programs were modeled after the programs upheld in *Fullilove*. I conclude that the DOT, FHA and CFLHD's policies do not violate equal protection since they are supported by longstanding congressional policies related to achieving the important governmental objective of remedying discrimination. Additionally, the challenged programs are narrowly tailored to achieve their legitimate objectives. I therefore conclude that the administrative program under which the defendants have acted meets the requirements of the Fifth and Fourteenth Amendments.

Accordingly, it is ORDERED that:

(1) the defendants' motion for summary judgment is granted;

(2) the plaintiff's motion for summary judgment is denied; and

(3) the plaintiff's claims and action are dismissed with prejudice.

Dated at Denver, Colorado April 21, 1992.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

ENTERED
ON THE DOCKET

APR 22 1992

JAMES R. MANGBEAKER
BY JM CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

William Pendley, Esq.
1660 Lincoln st. #2300
Denver, CO 80264

Stephen Taylor, Esq.
Assistant U.S. Attorney

John Dunne, Esq.
Assistant Attorney General
U.S. Department of Justice
P.O. Box 65968
Washington, DC 20035-5968

Magistrate Abram

/s/ Lucy Stis
Deputy Clerk

Dated: April 21, 1992

Re: 90-C-1413

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15 USC § 644(g)

(g) Goals for participation of small business concerns in procurement contracts. (1) The President shall annually establish Government-wide goals for procurement contacts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

(2) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and

economically disadvantaged individuals, in procurement contracts of such agency. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy for final determination. For the purpose of establishing goals under this subsection the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by socially and economically disadvantaged individuals. The head of each Federal agency, in attempting to attain such participation, shall consider –

(A) contracts awarded as the result of unrestricted competition; and

(B) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 8(a) [15 USCS § 637(a)].

No. 92-1242

In the UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC.,

Plaintiff-Appellant,

v.

FEDERICO PENA, Secretary of Department of Transportation, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLANT'S REPLY BRIEF

RECEIVED
United States Court of Appeals
Tenth Circuit
Feb. 17, 1993

ROBERT L. HOECKER
Clerk

William Perry Pendley
Todd S. Welch
John G. Nelson
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* * *

work. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 275 (1986) (plurality opinion). Instead, its only possible function is simply to increase the amount of business going to minority-owned firms. This is "discrimination for its own sake", which is the very essence of a constitutional violation. *Regents of the Univ. of California v. Bakke*, 438 U.S. 267, 305 (1978) (opinion of Powell, J.).

The factor which determines the level of preference under the SBA is the capacity of minority-owned firms to do work. This factor has no connection whatsoever to the level of discrimination identified, or to the appropriate remedy therefore [sic]. Indeed, this structure actually inverts the normal operation of a remedial program. Under a true remedial program, the level of preference accorded to the favored group should bear a relationship to the amount of discrimination members of the group have suffered. However, under the "maximum practicable" rule, as the level of pre-existing discrimination (and hence of the need for a remedy) decreases, the level of the goals for minority participation will actually increase.

Federal Defendants assert that the SBA is, in fact, remedial because Congressional files contained some evidence of discrimination against minorities when Congress enacted the goals provision. Brief for the Federal Appellees at 35. Adarand concedes, for the sake of discussion, that this evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*.[6] However, this concession is not enough to save Federal Defendants' argument. The reason is that Federal Defendants still must show that the provision is sufficiently well tailored to satisfy the requirements of *Fullilove*. This they cannot do.

In sum, the plain language of the SBA goals provision convincingly shows that it is not remedial in nature or intent. Adarand has already shown that the inclusion of the "maximum practicable" language in the SBA goals provision renders the provision unconstitutional under both strict and intermediate scrutiny. *See* Appellant's Opening Brief at 36-38 (strict scrutiny); Appellant's Opening Brief at 41 (intermediate scrutiny). The same conclusion applies even if *Fullilove* is chosen as the proper standard of review.

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[6] Much of this evidence is not part of the legislative history. *See* Brief for the Federal Appellees at 32-35. Consideration of this evidence is permissible under *Fullilove*. *Fullilove*, 448 U.S. 448, 502-503 (opinion of Powell, J.). However, strictly speaking, it is not proper in this case, because this evidence was not introduced in the district court and is not part of the administrative record. *See* Fed. R. App. P. 10(a).

CONCLUSION

Based upon the foregoing reasoning and authorities, Appellant Adarand Constructors, Inc. respectfully requests this Court to reverse the decision of the District Court and grant judgment for Adarand in this case.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF JERRY BUDWIG
MARCH 19, 1991

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* * *

[p. 23] A. No. No, I'm not capable.

Q. Do you know how many DBE contractors there are in the state of Colorado?

A. No.

Q. Do you know how many 8(a) DBE contractors there are in Colorado?

A. No.

Q. Do you know whether or not there has ever been any discrimination by the Central Division or its predecessors in the highway construction industry in the state of Colorado?

A. I would say that there has not been.

Q. Has your boss or anyone above him ever asked you to make a study or report about any alleged discrimination in the highway construction industry in this division?

A. No.

Q. Do you know what percentage of the highway contracts are generally subcontracted?

A. I know it's not supposed to exceed 50 percent under the terms of our contracts.

Q. But you don't – you don't – okay. Mr. Robinson testified that if – that meeting certain requirements, which I'm not going to go through with you, because I don't think it's relevant

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[p. 35] Q. In discussing the effects – evaluating the effects of the subcontracting compensation clause, do you know who that clause burdens in terms of the construction industry?

A. No.

Q. Do you know who it benefits?

A. I would think that it would benefit the recipients of the work under the provisions of the clause and probably benefits the prime contractors who avail themselves of the bonus provisions of that clause.

Q. So it would – if I understand you correctly, it would benefit the prime contractor who availed himself

of that provision and the DBE who received the subcontract as a result of that; is that correct?

A. I certainly wouldn't expect it in every instance that's the way it would work out, but I think overall it works out that way.

Q. And it would probably burden the subcontractors who are not DBEs who do that same kind of work?

A. That's a line of reasoning I won't argue with. There is some logic there.

Q. Do you know how long the subcontracting [p. 36] compensation clause will be used?

A. I'm not aware that its end is in sight.

Q. Have there been any discussions about a need to end the use of that provision?

A. Not that I've been a part of it.

Q. Okay. Has anyone ever reported to you, and I'm talking about a person that reports to you that they've been discriminated against in the highway industry?

A. No.

Q. Are special skills required in the construction industry?

A. Yes.

Q. Have you attempted to use any programs in – to include DBEs in construction contracts or – well, in construction contracts that are not race based?

A. I think the answer is no, unless you want to – again, want to do the woman-owned businesses, that's not race based, not necessarily anyway.

Q. Other than women.

A. Other than women I think the answer to that would be no.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF JAMES L. ROBINSON
MARCH 19, 1991

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[p. 45] development of the West Dolores project contract documents?

A. Yes, I was.

Q. Is that correct?

A. Yes.

Q. What was the goal at that time?

A. I would have to look in the files to get the exact number, but I would say the total goal was in the range of 12 to 15 percent.

Q. What does the 12 to 15 percent represent?

A. Dollars of our program. Typically our contract awards will be about $40 million per year, so the goal for the DBE then is in the range of four or five million through those three means of counting the numbers.

Q. What happens if you don't meet that goal?

A. Mr. Budwig receives a chat from the supervisor.

Q. Does it change from year to year?

A. In recent years it hasn't changed greatly.

Q. Do you know if that goal is different for this division than it is for the other two

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